Supreme Court, U.S.
FILED

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03 202 JUN 2 2003

No.

IN THE

Supreme Court of the United States

SAGHI ZILKA

Petitioner

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al.

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Saghi Zilka
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55 pp

QUESTIONS PRESENTED FOR REVIEW

The primary question for review is whether terminating sanctions against a defendant in a case involving real property are Constitutional. Specifically F.R.C.P. 37B2c seems to inherently violate the 5th and 7th Amendments.

The following issues were also raised in this case:

1. Do state law privileges exist in federal court?
2. If the transferor is uncooperative in discovery, is it still fair to impose terminating sanctions on the legal owner of the house, namely the transferee?

LIST OF PARTIES

Please note: *The following list is not identical to the proof of service list because several of the parties have settled.*

Plaintiffs: Connecticut General Life Insurance Company; Equitable Life Assurance Society of the United States; Cigna Employee Benefits Services, Inc.; United Healthcare Corporation; Humana, Inc.; Aetna Life Insurance Company; and Aetna U.S. Healthcare, Inc.

Defendants: New Images of Beverly Hills, Inc. (dba Beverly Hills Outpatient Surgery Center); Peter M. Golden, M.D.; Sean Michael Golden Irrevocable Trust; Willow Glen Enterprises (dba Moreno Valley Ambulatory Surgery Center); John Bohn; Susan Alter; Advanced Laser Surgical Center, Inc. (dba Advanced Laser Surgical Center); Advanced Laser Surgical Medical Group, Inc.; Thu Ngoc Pham; Saeid Sadighi, M.D.; Mir Jaffar Shadjareh; West Olympic Surgery Center & Laser Institute, Inc. (dba West Olympic Surgery Center and Laser Institute); Ronald W. Strahan, M.D.; Los Angeles Surgical Medical Group, Inc.; Cal-Surge, Inc. (dba Westwood Surgery Center); Herbert Hudson; Thomas Cloud, M.D.; Wilshire Outpatient Surgery Center, Inc. (dba Wilshire Outpatient Surgery Center); Rolando A. Fernando, M.D.; Wilshire West Ambulatory Surgery Center; Mamdouh Bahna, M.D.; All-American Medical Group, Inc. (dba Mariners Bay Surgical Center); Ata O. Montazeri, M.D.; Monroe Family Medical Group Outpatient Surgery Center, Inc. (dba Monroe Family Medical Group Outpatient Surgery Center); Lemmon McMillan, M.D.; Providence Ambulatory Surgery Center, Inc. (dba Providence Ambulatory Surgery Center); Harrell Robinson, M.D.; Abasali Amir-Jahed, M.D.;

Hector H. Arnazzi, M.D.; Steven A. Burress, M.D.; Clifford Ermshar, M.D.; William A. Jorgensen, M.D.; Kong S. Koh, M.D.; Lee D. Newman, M.D.; Teofilo Po, M.D.; Alvin Reiter, M.D.; Mohsen Tavoussi, D.O.; Ezeckiel Zilka, M.D.; Saghi Zilka; Haya Zilka; D.A.S. International Medical Marketing, Ltd.; Sim Hoffman, M.D.; Advanced Professional Imaging, Inc.; Ronald Grusd, M.D.; The Oaks Diagnostics, Inc. (dba Advanced Radiology of Beverly Hills); and DOE DEFENDANTS 1-25

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CITATIONS OF OFFICIAL AND UNOFFICAL REPORTS

Connecticut General Life Insurance Company, et al., v. Ezeckiel Zilka, M.D., Saghi Zilka, et al., and New Images of Beverly Hills, Docket No. 02-56021, 56 Fed. Appx. 828; 2003 U.S. App. LEXIS 3962 (9th Cir. Mar 3, 2003)

Connecticut General Life Insurance Company, et al. v. New Images of Beverly Hills, etc., et al., CV-99-08197-TJH (VBKx) (C.D. Ca. May 8, 2001)

Connecticut General Life Insurance Company, et al. v. New Images of Beverly Hills, etc., et al., CV-99-08197-JSL (AIJx) (C.D. Ca. Nov. 15, 2001)

BASIS FOR JURISDICTION IN THIS COURT

1. On March 3, 2003, the Ninth Circuit entered the order which I seek to be reviewed, namely the affirmation of the district court's granting terminating sanctions.
2. My petition for writ of certiorari was mailed to this court on June 2, 2003, and received on June 6. It was returned and I was given 60 days to make corrections.
3. The statutory provision that gives this court jurisdiction to review on a writ of certiorari is 28 U.S.C. §2101(c)
4. Although the United States is not a party to this action, I am questioning the Constitutionality of an Act of Congress and so 28 U.S.C. §2403(a) may apply. I have notified the Solicitor General as required by Rule 29.4b.

Although this court takes very few cases, the issues raised in this case have sweeping implications which should be addressed. These concerns affect the general public and not just me. For example, fraudulent transfers are particularly important to the Internal Revenue Service. Furthermore, the issues are not just limited to fraudulent

transfers but are highly general.

On a personal level, I feel that a terrible injustice was committed by the district court and Ninth Circuit. I have no other remedy. I feel that an unjust exception of the rules was made just for me and I would like to see the concept, "Equal Justice Under the Law" prevail.

CONSTITITIONAL PROVISIONS AND STATUTES

The following Constitutional provisions and statutes are involved in this case and appear in the appendix, page r:

Fifth Amendment, United States Constitution
Seventh Amendment, United States Constitution
F.R.E. 401
F.R.E. 402
F.R.E. 403
F.R.E. 501
F.R.C.P. 37b2c
F.R.C.P. 26(f)
28 U.S.C. §1331
28 U.S.C. §1332
28 U.S.C. §1367
28 U.S.C. §1391(b)
28 U.S.C. §2101(c)
28 U.S.C. §2403(a)
California Civil Code §3439-3439.12

STATEMENT OF FACTS AND BASIS FOR FEDERAL JURISDICTION

On August 12, 1999, plaintiffs filed suit against over forty defendants for RICO violations in the United States District Court for the Central District of California. In September 2000, summary judgment was granted against my father, Ezeckiel Zilka, a defendant in the civil suit. This was reduced to final judgment on January 29, 2001,

pursuant to F.R.C.P. 54(b). On March 5, 2001, plaintiffs amended their complaint* with the 19th Claim, alleging that my house was fraudulently transferred to me by my father in violation of California Civil Code §3439-3439.12 (Uniform Fraudulent Transfer Act).

Although the 19th Claim involved purely California law, it was ancillary to the RICO claim against my father. Thus, the district court possessed jurisdiction by virtue of 18 U.S.C. §1964(c), 28 U.S.C. §1331 and 28 U.S.C. §1332. Plaintiffs further contend that the 19th Claim is so closely related to the federal claim that 28 U.S.C. §1367 applies.

The Central District of California was the proper venue according to 28 U.S.C. §1391(b) since the actions took place here and some of the defendants reside here.

Before proceeding, it is important to note at this point that my father never had title to the house.

Shortly thereafter plaintiffs subpoenaed my personal bank information. Via a conference call, the judge stipulated that plaintiffs would have access to checks pertaining to the house only and that I was supposed to identify any such checks.

Plaintiffs then served me with a "First Set of Document Request", asking for, among other things, mine and my spouse's tax returns. The request for my spouse's tax returns seems inappropriate but the point is moot since I have never been married.

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* The "Order on Plaintiffs' Motion for Leave to Amend Complaint" signed by Judge Letts states that the Court heard oral argument and that "defendants were represented by their counsel of record ...." There were, however, no oral arguments and no appearances by counsel.

Around the same time, I sought "PMK" Depositions and my father served them with contention interrogatories. Plaintiffs sought a protective order, which the judge granted.

Moreover, the judge signed an order to compel discovery production on June 26, 2001, against me and my father. (The scope of discovery against my father went beyond the house since it also pertained to judgment enforcement against him.) It was my understanding, however, that tax returns are absolutely privileged under California law, and that state law privileges apply in federal cases pursuant to F.R.E. 501.

Accordingly, I appealed the matter of my tax returns to the Ninth Circuit Court of Appeals.

I also filed a motion to recuse the judge due to several inappropriate comments he made during the June 26th hearing. As a result, he was temporarily barred from hearing this matter. He regained jurisdiction after my motion was ultimately denied by Judge Hupp.

Prior to the June 26th hearing, there was a flurry of activity concerning a "phantom" letter written by plaintiffs' counsel, Eve Triffo, on May 22, 2001, which she confirmed that she had no record of having been sent. In a declaration made June 11, 2001, my counsel at the time, Joel Bennett, expressed his concern to the Court that:

> It would appear that what Plaintiffs are seeking to do is create a false set of circumstances under which they will file a motion for terminating sanctions using a false allegation of non-cooperation by

> Defendant Ezeckiel Zilka. Plaintiffs know full well that they can not prove their allegations as contained in the Nineteenth Claim and they have now figured out that they [sic] only way they will be able to prevail is to create a false circumstance to try and get the court to grant a terminating sanction. This is an outrageous circumstance and the court should not permit it.

On November 5, 2001, the judge awarded terminating sanctions against me. Although the order -- written on plaintiffs' counsels' stationery -- states that oral arguments were heard, there were no oral arguments.

In February of 2002, Judge Letts recused himself amidst an allegation of misconduct filed by my mother, Haya Zilka, who had recently been added as a defendant. Although the judge called this "forum shopping" and a "scathing personal attack", one must recall that the judge fought my previous effort to recuse him.

In May of 2002, the new judge, Judge Hatter affirmed the terminating sanctions and ordered a judicial sale of my property. See appendix, page i.

The Ninth Circuit heard oral arguments on February 11, 2003, in which my house was briefly touched upon. Three other appeals were consolidated and the court gave us only twenty minutes to brief all four, plus another five minutes of rebuttal.

On February 21, 2003, we were evicted from the house by the United States Marshal and subsequently the house was put up for judicial sale.

On March 3, 2003, the Ninth Circuit rendered its decision,

which appears in appendix, page a. It seems to revoke the F.R.E. by saying that state law privileges do not apply in federal court, but since it is unpublished, it is not precedent setting. Moreover, it focuses on my father, which brings up the matter of propriety of imposing terminating sanctions based on alleged recalcitrance of the "transferor". Finally, the Court said that many of the arguments were not properly preserved for appeal. It is important to note, however, that a critical argument, namely the expiration of the statute of limitations, was raised to Judge Letts on the June 26, 2001, hearing and that he ignored it.

It is important to note that I never got to present a defense against the allegations made in the 19th Claim or even to contest them, despite the fact that my case had merit. For example, the statute of limitations had expired and there was no transfer as defined by the UFTA. Moreover, there were flaws in the plaintiffs' chain of reasoning, which was mere conjecture that did not preclude an alternative explanation.

There is also a question as to how settlement payments made by the other defendants in this case have offset the judgment owed by my father. It could very well be that he doesn't even owe the plaintiffs any money, which would make the fraudulent transfer case moot.

ARGUMENT

FLAWS WITH DISCOVERY IN THIS CASE:

Terminating sanctions stem from alleged discovery abuse, making discovery the heart of the matter. The discovery sought by plaintiffs is flawed in at least three fundamental respects.

First, plaintiffs sought my tax returns, which are

absolutely privileged under California law. This privilege extends to the federal court by virtue of F.R.E. 501, which states that "... in civil actions ... the privilege of a ... person ... shall be determined in accordance with State law." Plaintiffs contend that state law privileges do not apply in federal court for federal questions and the Ninth Circuit concurred. This begs the question, where else would F.R.E. 501 be applicable but in federal court? And when would a federal court ever hear an issue that is purely state law?

Second, assuming that plaintiffs were legally entitled to those returns, they would not even be relevant as defined by F.R.E. 401. My income tax returns do not affect the likelihood of any of the allegations in the 19th Claim. In a trial, they could not be brought up according to F.R.E. 402 for lack of relevance. Even assuming, for the sake of argument that they were relevant, they may have been excluded according to F.R.E. 403 to avoid overkill.

Third, and most important, the word discovery implies finding something new. The use of discovery for any other purpose should be suspect. This is especially true if the plaintiffs seem to have a lot of evidence on their hands, as do these particular plaintiffs. Any skeptical court should wonder why the plaintiffs even needed discovery considering the excruciating detail in the 19th Claim. It would seem that they know everything there is to know.

This question becomes all the more alarming when one realizes that many other defendants in this case received terminating sanctions. Clearly my fate was not an isolated incident. Given that terminating sanctions stem from alleged discovery abuse and that the plaintiffs seemed to have a case *a priori*, the discovery policies

employed by the court must be scrutinized. As can be seen in the appendix, page ff, Judge Letts has a unique discovery policy within the Central District of California, which is unsettling given his propensity to impose terminating sanctions.

As will be argued, it seems that crafty lawyers have stumbled upon a scheme involving loose interpretation of the F.R.C.P. whereby crying foul, they can win a case and even imprison the defendant. Ultimately, this violates the Constitutional rights of the accused.

FLAWS WITH THE DISTRICT COURT'S IMPOSITION OF TERMINATING SANCTIONS:
The imposition of any sanctions, let alone terminating sanctions, was not called for because F.R.C.P. 26(f) mandates that counsel must meet and confer to attempt to resolve the discovery conflict. It is only after this meeting has taken place and been unproductive that motions to compel discovery -- and sanctions -- can happen. There was no such meeting, however, and plaintiffs readily admit to this in their oral arguments presented to the Ninth Circuit on February 11, 2003. Judge Letts' opinion as expressed in the June 26, 2001, hearing was to "forget about meet and confer".

Notwithstanding the fact that I had fully complied with the discovery requests in all other matters, plaintiffs argued that they were handicapped by my refusal to produce my tax returns. One would hope that they had the evidence to back up their extremely specific complaint (which is not merely an allegation of fraudulent transfer but a detailed scenario.) Nevertheless, Judge Letts awarded terminating sanctions as to the 19th Claim on November 5, 2001.

It seems highly improper to sanction me on a matter that is under appeal. What is more, terminating sanctions are warranted only after less severe penalties have been imposed. The plaintiffs did indeed threaten my arrest but relented because they had already obtained terminating sanctions.

It is inconceivable that I should have ever faced incarceration in a civil case. Although it is true that in a legal sense imprisonment for contempt is considered less severe than the entry of default judgment, common sense dictates that incarceration is a choice of absolute last resort. If plaintiffs have a less Draconian remedy available to them, they should take it.

Indeed, they should have sought issue sanctions. By doing do, they would have received a ruling that the contents of the returns can be assumed to be favorable to them. Clearly, this would have been far more productive.

Nevertheless, plaintiffs did not even explore this avenue because, generous as it is, it would have proved futile. They would have still had to prove a fraudulent transfer case but there was no transfer.

FLAWS WITH TERMINATING SANCTIONS IN GENERAL:

The larger question remains: is it appropriate to even have terminating sanctions against a defendant? I would argue not, that it is unconstitutional and that, furthermore, it is nonsensical. I explain below.

Terminating sanctions would appear to inherently deprive the defendant of due process. Before advancing this argument, however, we need to define due process.

Used in such phrases as "due time" and "due diligence", the word "due" seems to suggest "necessary", "befitting", and more particularly, "proper". It would seem, then, that "due process" means a procedure befitting the severity of the matter at hand, in this case the ownership of a home.

Propriety -- and hence "due process" -- demands a fair jury trial, as allowed for by the 7th Amendment, in which the plaintiffs must prove their claims by at least preponderance of the evidence, the minimum standard in a civil case.

Although a defense lawyer could theoretically get in a few words edgewise in his response briefs, it goes without saying that the defendant should be able to mount a full, vigorous defense. This would include the opportunity to actively counter and refute claims against him.

The F.R.C.P. was drafted with the intention of reducing expenses and surprises in trials, not to eliminate them. The accused has a 7th Amendment right to jury trial in a civil case. The defendant's response or lack thereof to discovery should not be used to judge the merits of the claim; discovery cannot substitute for a trial.

This court has previously recognized the dangers of discovery abuse. It noted in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), that the potentially noble concept of discovery can be abused by a plaintiff with a baseless claim to extract a higher settlement offer.

Since **F.R.C.P. 37b2c** stifles the defendant's right to mount a defense, it would appear that this law **is in conflict with the due process clause of the 5th Amendment**. Insofar as the 5th Amendment is a fundamental law of this country, subject to change only

by amendment ratified by Congress and by three-fourths of the states, whereas the F.R.C.P. 37b2c is a recent law, subject to review by this Court pursuant to *Marbury v. Madison*, 5 U. 137 (1803), it seems that the 5th Amendment co. iderations must prevail.

Aside from due process concerns, the larger issue is that terminating sanctions don't even prove anything of consequence. While one can surmise that someone who refuses to cooperate with discovery must have something to hide, one can equally draw sinister inferences from a defendant who is cooperative with discovery as well, given that a natural posture for him would be "you prove it". Since cooperation with discovery or lack thereof does not affect the likelihood of the underlying complaint, it is not a relevant means of assessing overall guilt within the context of the F.R.E.

This leads to a startling realization. Since terminating sanctions make it neither less likely nor more likely that the defendant is guilty, they provide no more insight than would flipping a coin!

Moreover, terminating sanctions are arbitrary in that not every judge will approve the given set of discovery questions. Thus, terminating sanctions puts the defendant more in the hands of the fates which control the judicial lottery than is desirable.

In short, the use of terminating sanctions to determine the guilt of a defendant is subjective, inconclusive and irrelevant. It simply cannot determine what happened outside the court, gut feelings notwithstanding. Coupled with the fact that it inherently deprives the defendant of his Constitutional due process rights, it should be dispensed with.

The law of the United States is one thing. But the concept of a court is universal and the fundamental precept is that the accused get to mount a defense. By preventing him from doing so, terminating sanctions violates the social contract by which people in a civilized society agree to have impartial third parties, namely the court, resolve their disputes. Terminating sanctions is little more than a return to the medieval concept of trial by ordeal. Moreover, since this happens to be the United States, it is very shocking for courts, which draw their power from the Constitution, to deprive people of their Constitutional rights.

THIS CASE ILLUSTRATES THE FLAWS WITH TERMINATING SANCTIONS:

This case and its prosecution illustrate the flaws inherent to terminating sanctions.

Plaintiffs had many things in their favor from the outset. They did not have to prove their case beyond a reasonable doubt. Also, California law is extremely favorable to creditors. In Florida or Texas, they wouldn't be able to take away my father's house, let alone mine. Some states do not find it equitable to take away people's homes.

If plaintiffs had the "open and shut" case they claimed to have, why would they seek terminating sanctions? In fact, it just delayed things since jury trial was scheduled for August 2001 and it took them until November of that year to procure the sanctions. Better yet, they could have filed for a motion for summary judgment within days of filing their complaint in March of 2001.

Apparently, this delay was an acceptable tradeoff to shield their claim from scrutiny. In fact, they sought and

received a protective order from my discovery efforts!

Plaintiffs with a bona fide case would not need protective orders, terminating sanctions, and heavy use of *ex parte* motions. Put bluntly, something is terribly wrong here.

The problem becomes glaringly obvious when one examines the initial conditions from which everything mushroomed. For all the talk of fraudulent transfer, this case was not decided on the merits but was based on discovery procedures. And yet there was no "meet and confer". Without the prerequisite meeting of council, it is not appropriate to conclude that discovery was abused by the defendant, let alone take his house.

For the court to take my house under these circumstances is bad enough but the prospect that I could have been incarcerated for contempt of court is particularly galling. It is quite a twist to get jailed for the privilege of being robbed.

One of the most shocking aspects of this case, however, is how flagrantly statutes and rules written in plain English were ignored. Even though the courts have some flexibility in interpreting the law to grant equitable relief, there must be limits to be fair to the defendant.

There was no good reason to ignore the California UFTA's definition of transfer or its provisions that the judgment be limited to the value of the asset at the time of transfer which would preclude their obtaining the capital gains.

More ominously, since this case was not decided on the merits but rather discovery issues, the courts ignored clear language in the F.R.C.P and local rules. In fact, during

the 2/11/2003 hearing, Judge Hawkins of the Ninth Circuit made the point that the local rules say that a "meet and confer" shall take place. It is the epitome of unfairness -- and underhandedness -- to totally ignore this stringent requirement just for me. This is especially so given that this conference is the cornerstone of discovery.

What is truly frightening, however, is that in and of itself, **nothing about FRCP 37b2c requires a connection between the discovery sought and the underlying complaint**. Thus, a complaint drawn from thin air can be "proved".

Although the plaintiffs' claim does not represent the worst case scenario in this regard, they were still able to establish that I had violated California Civil Code §3439-3439.12 when in reality I had not done so. This is because the discovery laws were not even remotely followed -- except, of course, for F.R.C.P. 37B2c.

These laws had to be bent because the plaintiffs' illogical method of discovery. Instead of finding out where my father lives and using discovery to see where things lead, they presented the court with the end result (namely the detailed scenario in the 19th Claim) and *then* claimed to need discovery. This is akin to putting the cart before the horse.

The "necessary" information revolved around tax returns. Although they can be used to identify fraudulent transfers (and are used by the government, which is not bound by state law), plaintiffs had *already* identified what they claimed was a fraudulent transfer and thus did not truly need them.

To make matters worse, plaintiffs' claimed to be entitled

to discovery not because they needed evidence but precisely because they have it! This position is utterly absurd. First, it begs the question: how did they get that evidence in the first place, if not through discovery? Second, it is a tacit admission that the quality of evidence is no good, which makes the quantity -- the "mountain of evidence" a liability instead of a strength.

In the late 1970s, obvious murderers were often released just because the arresting officer did not read them their Miranda rights verbatim. This case represents the opposite extreme in that now complaints do not have to even be proven. When one factors in that the plaintiffs didn't even bother to lay the necessary groundwork (namely the meet and confer) to be able to claim discovery abuse, this is a situation just as intolerable as the excesses of the 1970s, if not moreso.

It is clear, then, that terminating sanctions are just a cheap shot to win a bad case. When discovery is used like it was in my case, its sole purpose would seem to be, ironically, preventing the discovery of the defendant's side of the story.

In conclusion, perhaps the best example of the specious logic in terminating sanctions can be found in the May 8, 2002 order. For a court that has determined that I had engaged in fraud (by being the transferee in a fraudulent transfer) to put me in a position of trust, namely the trustee, is strange. But it is absolutely mind boggling that they wanted me to sign over the house when the whole point of the proceeding was to show that the house isn't mine!

REMEDY SOUGHT

An alleged fraudulent transfer does not warrant the

suspension of my Constitutional rights to a jury trial. Accordingly, I respectfully ask this court to remand this matter to the district court for jury trial. Anyone with even the slightest faith in our legal system would agree that this is fair to both me and the plaintiffs.

Furthermore, I feel that this court should address the underlying problem of discovery abuse. I feel that failure to overturn the F.R.C.P. 37B2c, or at least regulate its use in suits involving property, would set the dangerous precedent of allowing unscrupulous people to steal property merely by filing suit against the owner -- using any charges whatsoever -- and presenting them with an outrageous discovery request.

This can never be in the public's interest and so, by existing case law governing their use, terminating sanctions are never appropriate. The needs of the generic property owner to be shielded from baseless allegations and not have his property stolen outweigh those of a litigant who can still avail himself of the remedies that would be awarded upon winning a jury trial.

Accordingly, I hope that this Court will close this loophole.

Respectfully submitted,
Saghi Zilka
By: _____

Dated: July 31, 2003

APPENDIX

THE NINTH CIRCUIT'S RULING:

FILED
MAR 03 2003
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al.,

Plaintiffs - Appellees,

v.

EZECKIEL ZILKA, M.D., SAGHI ZILKA, et al.,

Defendants - Appellants,

and

NEW IMAGES OF BEVERLY HILLS, et al.,

Defendants.

No. 02-56021
D.C. No. CV-99-08197-TJH-17

MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
Terry J. Hatter, Chief District Judge, Presiding

Argued and Submitted February 11, 2003
Pasadena, California

Before: B. FLETCHER and HAWKINS, Circuit Judges, and BURY,** District Judge.

The district court did not abuse its discretion by imposing terminating sanctions with respect to plaintiffs' fraudulent conveyance claim. Appellants argue that the district court's original discovery order should be vacated because plaintiffs failed to comply with local "meet and confer" rules. We have previously affirmed the district court's motion to compel discovery, and various follow-up orders, "in all respects." Law of the case precludes reconsideration of the validity of the district court's discovery order. See Leslie Salt Co. v. United States, 55 F. 3d 1388, 1392 (9th Cir. 1995).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

** Honorable David C. Bury, United States District Judge for the District of Arizona, sitting by designation.

Appellants cannot assert "good faith compliance" with the discovery orders, because they continued to withhold documents that they believed were privileged, even though the district court had rejected their discovery objections. Appellants' argument that their appeal of the district court's discovery order justified their defiance of that order is baseless. Interlocutory appeals cannot be taken from discovery orders, see Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1490 (9th Cir. 1989), and, absent a stay, a party must comply with an order until reversed by appeal. Manness v. Meyers, 419 U.S. 449, 458-59 (1975). Furthermore, appellants base their claim of privilege on California law. Plaintiffs' RICO claim raised a federal question and therefore federal privilege law applies to the entire action, including pendent state law claims. See Religious Tec. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992); Folb v.Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1169 (C.D. Cal. 1998) aff'd, 216 F.3d 1082 (9th Cir. 2000).

Ezeckiel Zilka also asserts that he should not be compelled to produce documents not in his legal control. Portions of this argument are irrelevant to this appeal, as they pertain to his ability to produce documents of entities controlled by Haya Zilka. To the extent Ezeckiel is arguing that he did not have to produce documents pertaining to the Beverly Hills home because he does not own it, this is of course the very subject of dispute, and this argument is also precluded by law of the case, as it was made and rejected on the prior appeal.

The remaining arguments[1] are raised for the first

[1] Appellants argue that the district court failed to employ the correct test for imposing terminating sanctions, failed to consider lesser sanctions and failed to conduct an evidentiary hearing. They also

time on appeal or were raised for the first time to the district court in a motion to reconsider the sanctions. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir. 1995) ("A party does not properly preserve an issue for appeal by raising it for the first time in a motion for reconsideration."). Accordingly, the remaining issues have been waived.

AFFIRMED.

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argue that plaintiffs did not establish that they suffered prejudice from the appellants' failure to comply with the discovery order or that plaintiffs acted in bad faith.

THE DISTRICT COURT'S ORDER IMPOSING TERMINATING SANCTIONS:

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FILED
CLERK, U.S. DISTRICT COURT
FILED
NOV 15 2001
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al.,

Plaintiffs,

vs.

NEW IMAGES OF BEVERLY HILLS, etc.,

et al.,)
)
Defendants.)
)
AND CONSOLIDATED ACTIONS)
)

CASE NO: CV-99-08197-JSL (AIJx)
[CV-99-08197-JSL (AIJx)]

~~(PROPOSED)~~ ORDER ON MOTION FOR TERMINATING SANCTIONS ON THE NINETEENTH CLAIM FOR RELIEF IN THE AMENDED COMPLAINT

Date: September 17, 2001
Time: 1:00 p.m.
Courtroom:

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NOV 16 2001

On November 5 ~~September 17~~, 2001 the regularly noticed Motion for Terminating Sanctions Against Defendants Ezeckiel Zilka and Saghi Zilka on the Nineteenth Claim for Relief in the Amended Complaint ("Motion") by Plaintiffs and Movants Connecticut General Life Insurance Company, Equitable Life Assurance Society of the United States, Cigna Employee Benefits Services, Inc., United Healthcare Corporation, Humana Inc., Aetna Life Insurance Company and Aetna U.S. Healthcare, Inc. ("Plaintiffs") came on calendar for hearing. Plaintiffs were represented by their counsel of record, Lawrence C. Fox of Kornstein Veisz & Wexler LLP and Eve Triffo of Hennelly & Grossfeld LLP. Defendants Ezeckiel Zilka and Saghi Zilka were

represented by their counsel of record, Joel Bennett and Matthew Fairshter of Bennett & Fairshter.

The Court, having heard oral argument on the Motion, and having considered all papers and evidence on file therein, hereby orders, adjudges and decrees the following:

Plaintiffs' Motion For Terminating Sanctions on Nineteenth Claim for Relief in Amended Complaint against Defendants Ezeckiel Zilka and Saghi Zilka is hereby GRANTED on the Nineteenth Claim for Relief in Plaintiffs' "Amended Complaint For Violation Of The Racketeer Influenced Corrupt Organizations Act; Fraud; Negligent Misrepresentation; Tortious Interference; Constructive Trust; Violation of California Business & Professions Code". The Court hereby retains jurisdiction with respect to all matters regarding implementation and enforcement of this Order.

DATED: ~~September~~ Nov 15, 2001

s/SwLetts
J. SPENCER LETTS
Judge of the United States District Court

Presented by:

Marvin Wexler
Lawrence C. Fox
KORNSTEIN VEISZ & WEXLER LLP

Eve Triffo
HENNELLY & GROSSFELD LLP

By s/Eve Triffo
EVE TRIFFO
Attorneys for Plaintiffs and Movants

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THE DISTRICT COURT'S ORDER ENTERING JUDGMENT AND JUDICIAL SALE:

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Attorneys for Plaintiffs

FILED
CLERK, U.S. DISTRICT COURT
MAY-8 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPOT

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 9 2002
5-9-02
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77(d).

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al.,	)
Plaintiffs,	)
vs.	)
NEW IMAGES OF BEVERLY HILLS, etc., et al.,	)
Defendants.	)
AND CONSOLIDATED ACTIONS	)

CASE NO: CV-99008197-TJH (VBKx)
~~[CV-99-08197-TJH (VBKx)]~~

~~(PROPOSED)~~ AMENDED ORDER AND JUDGMENT ON PLAINTIFFS' CLAIM FOR FRAUDULENT TRANSFER AGAINST DEFENDANTS EZECKIEL ZILKA AND SAGHI ZILKA AND FOR JUDICIAL SALE OF REAL PROPERTY

Date:
Time:
Judge: Hon. Terry J. Hatter
Courtroom: 17

Plaintiffs' Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka for fraudulent transfer having been duly decided, and decision thereon having been rendered in favor of Plaintiffs Connecticut General Life Insurance Company, Equitable Life Assurance Society of the United States, Cigna Employee Benefits Services, Inc., United HealthCare Corporation, Humana Inc., Aetna Life Insurance Company and Aetna U.S. Healthcare, Inc. ("Plaintiffs") and against said Defendants; and

An Order and Judgment having been filed on April 30, 2002 and entered on May 1, 2002; and

Plaintiffs having made on May 3, 2002 an Ex Pate Application to modify that Order and Judgment in certain respects; and

The Court, having reviewed and considered all papers and arguments submitted in support of and in opposition to the Ex Parte Application, and good cause appearing therefore,

IT IS HEREBY ORDERED AND ADJUDGED that:

A. Entry of Judgment

1. Pursuant to Federal Rule of Civil Procedure 54(b), THE CLERK OF COURT IS DIRECTED TO ENTER JUDGMENT in favor of Plaintiffs and against Defendants Ezeckiel Zilka and Saghi Zilka on Plaintiffs' Nineteenth Claim For Relief for Fraudulent Transfer in Plaintiffs' First Amended Complaint.

2. The Court certifies said Judgment against Defendants Ezeckiel Zilka and Saghi Zilka pursuant to Federal Rule of Civil Procedure 54(b). The Court expressly determines that there is no just reason for delaying entry of Judgment for, inter alia, the following reasons:

(a) There has been an ultimate disposition of

Plaintiffs' Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka on the merits, specifically disposition by terminating sanctions, entered in the course of this action involving multiple claims and multiple parties, and hence Judgment is appropriate for certification under Federal Rule of Civil Procedure 54(b).

(b) The Court finds that Plaintiffs have a legitimate interest in, and entitlement to, the prompt entry of a final and enforceable Judgment on their Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka.

(c) The Court finds that certification and entry of Judgment is consistent with sound judicial administration. Plaintiffs' Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka has been fully and finally decided.

(d) The Court further finds that Plaintiffs' remaining claims against other Defendants in the action are not intertwined with Plaintiffs' Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka as to create a risk of inefficiency with respect to the resolution of those remaining claims at the district court level or on appeal. The issues decided on Plaintiffs' Nineteenth Claim For Relief against Defendants Ezeckiel Zilka and Saghi Zilka are severable from those on the remaining claims and involve distinct factual issues.

3. As a consequence of this Judgement, and as relief awarded to Plaintiffs thereunder, the fraudulent transfer by Defendant Ezeckiel Zilka to Defendant Saghi Zilka of the house and real property located at 1120 El Retiro Way, Beverly Hills, California, which is the subject of the Nineteenth Claim for Relief (the "El Retiro Property") is hereby avoided, and the El Retiro Property is hereby adjudicated to be held by Saghi Zilka in constructive trust for the benefit of Plaintiffs.

4. The Court retains jurisdiction with respect to

all matters regarding implementation and enforcement of the Judgment certified by this Order.

B. Order For Judicial Sale of Real Property

1. The El Retiro Property shall be sold by private judicial sale, pursuant to 28 U.S.C. §2001(b). For the reasons set forth in Plaintiffs' Motion, the Court finds that the best interests of all concerned will be served by employing that statutory procedure.

2. The Court hereby appoints Laurie Hudson of Prudential John Aaroe & Associates, whom the Court finds to be disinterested in this matter and to be a qualified real estate agent, to list, market, show, and solicit offers to buy, the El Retiro Property, and/or to retain others to assist in those activities, and to take all steps that she deems reasonable and necessary to obtain a sale of the Property at the highest price. Laurie Hudson shall act as the authorized representative of the Court in fulfilling those responsibilities, and shall report to the Court concerning her activities and progress with respect to the sale of the Property, and send copies of her report to Plaintiffs' counsel, at least once every 30 days until the Property is sold.

3. Plaintiffs shall, subject to this Order and to the requirements of 28 U.S.C. §2001(b), be authorized to consider and accept reasonable bona fide offers for the purchase of the Property.

4. Pursuant to 28 U.S.C. §2001(b), the Court appoints (1) Barry Goldblatt of Brentwood Appraisals, (2) Jeffrey Zumbo and Scott Klauss of Major Appraisals and (3) Richard Wolfe of California Property Evaluation, all of whom the Court finds to be disinterested in this matter and to be qualified real estate appraisers, to prepare and submit to the Court and to Plaintiffs' counsel written appraisals of the fair market value of the El Retiro Property. Said appraisals shall be prepared and submitted

within 20 days of the issuance of this Order.

5. After an offer to purchase the El Retiro Property is accepted, and a contract of sale is prepared, that contract of sale shall be submitted to the Court for review, subject to the terms of 28 U.S.C. §2001(b). Any accepted offer must be for a total purchase price that is not less than two-thirds of the average of the three appraisals submitted to the Court. The contract of sale shall provide for the payment of standard and reasonable costs of sale, including brokerage commissions and title costs.

6.

If the Court approves the tentative contract of sale, the terms of that proposed sale shall then be advertised for 11 days in a newspaper of general circulation. Said advertisement shall invite anyone desiring to bid more than the proposed purchase price to submit a written offer not later than 15 days after the first date the aforementioned advertisement runs. No contract of sale may be confirmed if, in response to the aforementioned advertisement, a bona fide bid is received for 10% or more over the proposed purchase price.

7. No sale of the Property shall be consummated without prior express confirmation by Order of this Court.

8. (a) Ezeckiel Zilka and Saghi Zilka and other members of their family shall cooperate fully with the marketing and sale of the Property. Such cooperation shall include, but not be limited to, promptly supplying to the Court's authorized representative any requested documentation concerning the Property; permitting the taking of photographs and/or the videotaping of any portion of the Property, or any other action deemed appropriate by the Court's authorized representative in connection with the marketing or sale of the Property; and, if they continue to occupy the Property as set forth below, by appropriately maintaining the interior and

exterior of the Property as heretofore and by granting access to the Property to the Court's authorized representative or to any persons authorized by her at all reasonable times (including through placement of a lock box on the Property) for the purpose of showing the Property to prospective buyers.

(b) Ezeckiel and Saghi Zilka and members of their family may continue to occupy the Property while it is in the process of being sold, provided that they take no action to interfere with the marketing and sale of the Property or to diminish the value of the Property. If the Zilkas choose to occupy the Property while it is being sold, they shall be responsible:
(i)to pay on a timely basis any monthly mortgage or trust deed obligation on the Property for that period of occupancy, (ii) to maintain the full amount of all types of insurance on the Property maintained heretofore, and (iii) to reasonably and suitably maintain the appearance and attractiveness of the interior and exterior of the Property as maintained heretofore until it is sold. In that event, the Zilkas shall provide proof that they have timely paid any monthly mortgage or trust deed obligation, by submitting to Plaintiffs' counsel, by the 20th day of each month of continued occupancy, a copy of the check that they paid for that month's obligation or other adequate proof of payment. The Zilkas shall also provide proof of their maintenance of the full amount of all types of insurance on the Property as heretofore, and promptly respond to all inquiries from Plaintiffs' counsel regarding same.

(c) If the Zilkas fail to cooperate fully with the marketing or sale of the Property, or act in any way to diminish the value of the Property, or if they fail to pay timely the monthly mortgage or trust deed obligation on the Property, or to maintain insurance on the Property as required hereunder, they may be ordered by this Court to vacate the property on ten (10) days notice.

(d) If needed, Saghi Zilka shall sign the contract of sale of the Property to the confirmed buyer. If Saghi Zilka's signature is required on the contract of sale, and he refuses to provide it, the contract of sale may be signed, pursuant to this Judgment and Order for Sale, by the Court, by the Clerk of the Court, or by the U.S. Marshal as appropriate.

9. After deduction of closing costs, any applicable and reasonable brokerage fees or commissions, and any ancillary costs, and after payment of any outstanding mortgage on the Property, all proceeds from the sale of the El Retiro Property shall be paid to the escrow account of Plaintiffs' attorneys of record, Kornstein Veisz Wexler & Pollard, LLP, for distribution to Plaintiffs.

10. The Court hereby retains jurisdiction with respect to all matters regarding enforcement and implementation of this Order.

IT IS SO ORDERED.

DATED: 5/8, 2002

s/Terry J. Hatter Jr.
Honorable Terry J. Hatter, Jr.
United States District Court
Judge

Presented by:

Marvin Wexler
Lawrence C. Fox
KORNSTEIN VEISZ WEXLER & POLLARD, LLP

-and-

Eve Triffo
HENNELLY & GROSSFELD LLP

By s/Eve Triffo
EVE TRIFFO

Attorneys for Plaintiffs

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CONSTITUTIONAL PROVISIONS AND STATUTES:
Fifth Amendment, United States Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person** be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

Seventh Amendment, United States Constitution: **In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved**, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

F.R.E. 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

F.R.E. 402: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. **Evidence which is not relevant is not admissible**.

F.R.E. 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.R.E. 501: Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, **in civil actions** and proceedings, **with respect to** an element of **a** claim or **defense as to which State law supplies the rule of decision, the privilege of a** witness, **person,** government, State, or political subdivision thereof **shall be determined in accordance with State law**.

F.R.C.P. 37B2: **If a party** or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party **fails to obey an order to provide** or permit **discovery,** including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), **the court** in which the action is pending **may** make such orders in regard to the failure as are just, and among others the following:
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or **rendering a judgment by default against the disobedient party**;

F.R.C.P. 26(f): Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E)

or when otherwise ordered, **the parties must**, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), **confer** to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to **develop a proposed discovery plan** that indicates the parties' views and proposals concerning:
(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).
The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the

parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

28 U.S.C. §1331: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1332: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-- (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled. (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. (c) For the purposes of this section and section 1441 of this title-- (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the

insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent. (d) The word ``States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. §1367: a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of

section 1332. (c) **The district courts may decline to exercise supplemental jurisdiction over a claim** under subsection (a) **if**-- (1) **the claim raises a novel or complex issue of State law**, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. (e) As used in this section, the term ``State'' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. §1391(b): A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. §2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days

after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. §2403(a): In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

California Civil Code §3439-3439.12:
3439. This chapter may be cited as the Uniform Fraudulent TransferAct.

3439.01. As used in this chapter the following definitions are applicable:

(a) "Asset" means property of a debtor, but the term does not include, the following:

(1) Property to the extent it is encumbered by a valid lien.

(2) Property to the extent it is generally exempt under nonbankruptcy law.

(3) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(b) "Claim" means a right to payment, whether or not

the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(c) "Creditor" means a person who has a claim, and includes an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, of a debtor.

(d) "Debt" means liability on a claim.

(e) "Debtor" means a person who is liable on a claim.

(f) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(g) "Person" means an individual, partnership, corporation, limited liability company, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(h) "Property" means anything that may be the subject of ownership.

(i) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(j) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

3439.02. (a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.

(b) A debtor which is a partnership is insolvent if, at fair valuations, the sum of the partnership's debts is greater

than the aggregate of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(c) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

3439.03. Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

3439.04. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor wereunreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

3439.05. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

3439.06. For the purposes of this chapter:

(a) A transfer is made:

(1) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(2) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.

(b) If applicable law permits the transfer to be perfected as provided in subdivision (a) and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(c) If applicable law does not permit the transfer to be perfected as provided in subdivision (a), the transfer is made when it becomes effective between the debtor and

the transferee.

(d) **A transfer is not made until the debtor has acquired rights in the asset transferred.**

(e) An obligation is incurred:

(1) If oral, when it becomes effective between the parties; or

(2) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

3439.07. (a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:

(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or its proceeds.

(B) Appointment of a receiver to take charge of the asset
transferred or its proceeds.

(C) Any other relief the circumstances may require.

(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds if the remedy of attachment is available in the action under applicable law and the property is subject to attachment in the hands of the transferee under applicable law.

(c) If a creditor has obtained a judgment on a claim

against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

(d) A creditor who is an assignee of a general assignment for the benefit of creditors, as defined in Section 493.010 of the Code of Civil Procedure, may exercise any and all of the rights and remedies specified in this section if they are available to any one or more creditors of the assignor who are beneficiaries of the assignment, and, in that event (1) only to the extent the rights or remedies are so available and (2) only for the benefit of those creditors whose rights are asserted by the assignee.

3439.08. (a) A transfer or an obligation is not voidable under subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, **the creditor may recover judgment** for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against the following:

(1) The first transferee of the asset or the person for whose benefit the transfer was made.

(2) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subdivision (b) is based upon the value of the asset transferred, the judgment shall be **for an amount equal to the value of the asset at the time of the transfer**, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an

obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to the following:

(1) A lien on or a right to retain any interest in the asset transferred.

(2) Enforcement of any obligation incurred.

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under subdivision (b) of Section 3439.04 or Section 3439.05 if the transfer results from the following:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law.

(2) Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Division 9 (commencing with Section 9101) of the Commercial Code, other than a retention of collateral under Sections 9620 and 9621 of the Commercial Code and other than a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

3439.09. **A cause of action with respect to a fraudulent transfer** or obligation under this chapter **is extinguished unless action is brought** pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07:

(a) Under subdivision (a) of Section 3439.04, **within four years after the transfer was made** or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

(b) Under subdivision (b) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.

(c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made made within seven years after the transfer was made or the obligation was incurred.

3439.10. Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

3439.11. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

3439.12. This chapter, and the other changes in the law made by Chapter 383 of the Statutes of 1986, apply only to transfers made or obligations incurred on or after January 1, 1987; and, as to transfers made or obligations incurred prior to that date, the law in effect at the time the transfer was made or the obligation was incurred shall apply. The provisions of this chapter, insofar as they are substantially the same as the provisions of Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4, which was repealed by Chapter 383 of the Statutes of 1986, shall be construed as restatements and continuations, and not as new enactments.

DISCOVERY POLICIES OF THE JUDGES OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA:

(Source: www.cacd.uscourts.gov)

The following judges conduct discovery through a magistrate:

Anderson, P.	Baird, L.	Byrne, W.
Carney, C.	Collins, A.	Cooper, F.
Feess, G.	Hatter, T.	Hauk, A.
Hupp, H.	Keller, W.	King, G.
Klausner, R.	Lew, R.	Manella, N.
Marshall, C.	Matz, A.	Morrow, M.
Phillips, V.	Rafeedie, E.	Rea, W.
Selna, J.	Snyder, C.	Stotler, A.
Takasugi, R.	Taylor, G.	Tevrizian, D.
Walter, J.	Wilson, S.	

The following judges conduct their own discovery:

Kelleher, R.
Pflaezer, M.: Discovery motions are to be scheduled before the District Judge, who will have the court clerk refer each motion to the Magistrate Judge.
Real, M.: Judge Real handles all his own discovery, does not refer to a Magistrate Judge.
Timlin, R.

The discovery policies of the following judges are unavailable:

Carter, D. Otero, S. Pregerson, D.

Judge Letts' discovery policy: *"Discovery disputes are to be scheduled by conference call before the district judge by contacting the judge's secretary .... No discovery motions are to be filed."*

Clearly most judges outsource discovery and even among the few that conduct their own, Judge Letts' discovery policy is unique.

(2)

Supreme Court, U.S.
FILED
OCT 3 1 2003
OFFICE OF THE CLERK

Docket No. 03-202

IN THE

Supreme Court of the United States

SAGHI ZILKA

Petitioner

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al.

Respondents

On Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

Saghi Zilka
21645 Saddle Peak Rd.
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(310) 455-0548

13 11

On October 6, 2003, my petition for writ of certiorari was denied. I urge the Court to reconsider its decision for the following reasons.

I feel that if this Court does not take my case now, inevitably someone else will be stunned when they get terminating sanctions and will appeal. Sooner or later, this Court will have to decide.

This is not just a hypothetical consideration. As evidenced by "Discovery Sanctions as an Independent Case Strategy: An Alarming Trend in Litigation" by Jonathan J. Dunn and William J. King[1], litigants are increasingly resorting to discovery to "win" defective cases. The authors argue that it is insurance companies, ironically, that are most vulnerable to this scheme.

In denying certiorari, this Court upholds the status quo. One implication is that it finds that the body of law concerning terminating sanctions effectively protects due process. I would argue that the mere existence of such a body of case law implies that there are inherent due process concerns that others have encountered in the past. (And in conjunction with *Blue Chip* and my case, these concerns have not been satisfactorily resolved.) For example, *Phocene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982) holds that due process is indeed violated when the discovery is unrelated to the merits of the controversy.

The defendant supposedly receives due process if he was threatened with terminating sanctions and alternative

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[1] viewable online at www.dri.org/dri/pdf/feature_February03.pdf

sanctions were considered beforehand -- and even that isn't a strict requirement. *Adriana Int'l Corp* 913 F. 2d 1412-13. By this logic, I brought this problem upon myself by failing to produce my tax returns. But suppose I had produced my tax returns. Nothing would have prevented plaintiffs from filing a second document request, a third, and so on until it became impossible to comply. The request for tax returns was intentionally provocative, made with the hope that I would not comply in order that terminating sanctions could be imposed. It is obvious that this is just a ploy and that they are acting in bad faith.

Terminating sanctions are permissible when a party acts in bad faith. *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). It is imperative, therefore, for me to leave no doubt that it is actually the plaintiffs who are acting in bad faith.

Their bad faith can be readily established. As I discovered after submitting my petition, plaintiffs filed an ex parte motion almost immediately (September 1999) asking for the meet and confer to be delayed. A copy of this motion is attached as the appendix. It must have seemed innocent to the judge at the time but in hindsight seems sinister. Plaintiffs sought this delay under the pretext of caring about the quality of the conference and acknowledged its importance. Of course, the meeting never happened and the scenario detailed in my petition for writ of certiorari ensued. It is hard to imagine anything more deceptive.

Unfortunately, there is. The seemingly ubiquitous "Declaration[s] of Eve Triffo", with all their liberties with the truth, come to mind. Worse, their New York counsel's lack of ethics led to their being sued not once but twice in recent years -- by their own clients. *Estate of*

Re v. Kornstein, 958 F.Supp. 907 (SDNY 1997); *Kittay v. Kornstein*, 230 F.3d 531 (2d Cir. 2000). The multiple cases coupled with the misconduct detailed in my petition establish an undeniable pattern. Their unethical behavior was the subject of these two cases, not just a legal concept used to tangentially "prove" RICO or fraudulent transfer. If they are capable of doing what is alleged in these suits to their own clients, imagine what they would do to their adversary.

This may seem like a cheap shot but it is important to set the record straight when the consequence of being deemed to be in bad faith is the loss of one's house. Besides, it is the ultimate cheap shot to deprive the defendant of a defense; indeed the very term "defendant" becomes utterly absurd.

Of course, the Seventh Amendment considerations stand on their own and are equally important. Even though the right to jury trial technically has a monetary threshold (twenty dollars), this Court has held that the right to jury trial could exist even in cases involving statutory damages, where money isn't involved. *Feltner v. Columbia Pictures Tv., Inc.*, 523 U.S. 340 (1998). Certainly it must apply when hundreds of thousands of dollars, if not millions, are at stake.

The denial of certiorari also upheld the finding that my house was fraudulently transferred in violation of California Civil Code §3439-3439.12. Assuming for the sake of argument that the house were my father's, plaintiffs RICO case against him is too flawed for them to be able to take it. Plaintiffs' motion for summary judgment (he didn't get a jury trial, either) charged him with several of the other eighteen claims. Then, after the

entry of summary judgment, they added other claims, giving him no meaningful opportunity to rebut. Even with these shenanigans, his liability was only $1.7M, after the treble damages. Mysteriously, this was again trebled to $5.1M, and even with this wild increase in liability, it is questionable whether he owes anything because of the offset of other defendant's settlement. (There was never any accounting, not even of how the sale of my house impacted my father's judgment.)

Although I have no standing to argue my father's case, this lack of accounting represents an extreme departure from the accepted and usual course of judicial proceedings. As such, this Court should exercise its supervisory power, as specified in Rule 10a.

As mentioned in my petition, there was an issue of statute of limitations. In *Stogner v. California,* 539 U.S. __ (2003), Docket Number 01-1757, the majority opinion held that

> a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns -- for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.

I would argue that statute of limitations are even more important in fraudulent transfer cases because the passage of time also suggests the intent was more likely a gift than fraud. Of course, all these profound arguments get obscured and lost by the imposition of terminating sanctions.

The litmus test for any appeal is whether the issues brought up would have made any difference. I feel that the plaintiffs course of action answers that question. Why would plaintiffs have so eagerly sought terminating sanctions if they would yield the same results as a jury trial?

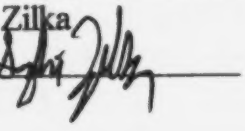
And this leads to the crux of the matter. In denying certiorari, this Court affirms the concept of terminating sanctions. But it certainly does not dispense with trials. Which begs the question: who gets terminating sanctions and who gets trials? This two tiered system of separate and dramatically unequal protection under the law seems to fly in the face of the equal protection clause of the Fourteenth Amendment.

For these reasons, I respectfully ask this Court to reconsider its denial of my petition for writ of certiorari.

Respectfully submitted,

Dated: October 29, 2003

Saghi Zilka

By: 

APPENDIX

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ATTORNEYS FOR PLAINTIFFS

FILED
CLERK, U.S. DISTRICT COURT
SEP 29 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, AND CIGNA EMPLOYEE BENEFITS SERVICES, INC., UNITED

HEALTHCARE CORPORATION, HUMANA INC., AETNA LIFE INSURANCE COMPANY, AND AETNA U.S HEALTHCARE, INC.,

Plaintiffs,

- against -

Case No.: CV-99-08197-AHM(AIJx)

EX PARTE NOTICE OF APPLICATION AND PLAINTIFFS' APPLICATION PURSUANT TO LOCAL RULE 6.1 FOR EXTENSION OF TIME TO HOLD EARLY MEETING OF COUNSEL

NEW IMAGES OF BEVERLY HILLS, INC. d/b/a BEVERLY HILLS OUTPATIENT SURGERY CENTER, PETER M. GOLDEN, M.D., SEAN MICHAEL GOLDEN IRREVOCABLE TRUST, WILLOW GLEN ENTERPRISES, INC. d/b/a MORENO VALLEY AMBULATORY SURGERY CENTER, JOHN BOHN, SUSAN ALTER, ADVANCED LASER SURGICAL CENTER INC. d/b/a ADVANCED LASER SURGICAL CENTER, ADVANCED LASER SURGEICAL MEDICAL GROUP, INC. THU NGOC PHAM, SAEID SADIGHI, M.D., MIR JAFFAR SHADJAREH, WEST OLYMPIC SURGERY CENTER & LASER INSTITUTE, INC. d/b/a WEST OLYPIC SURGERY CENTER & LASER INSTITUTE, RONALD W. STRAHAN, M.D., LOS ANGELES SURGICAL MEDICAL GROUP, INC., CAL-SURGE, INC. d/b/a WESTWOOD SURGERY CENTER, HERBERT HUDSON, THOMAS CLOUD, M.D., WILSHIRE

OUTPATIENT SURGERY CENTER, INC. d/b/a WILSHIRE OUTPATIENT SURGERY CENTER, ROLANDO A. FERNANDO, M.D., WILSHIRE WEST AMBULATORY SURGERY CENTER, MAMDOUH BAHNA, M.D., ALL-AMERICAN MEDICAL GROUP, INC. d/b/a MARINERS BAY SURGICAL CENTER, ATA O. MOTAZERI, M.D., MONROE FAMILY MEDICAL GROUP OUTPATIENT SURGERY CENTER, INC. d/b/a MONROE FAMILY MEDICAL GROUP

ENTERED ON ICMS
SEP 30 1999
CV

OUTPATIENT SURGERY CENTER, LEMMON MCMILLAN, M.D., PROVIDENCE AMBULATORY SURGERY CENTER, INC. d/b/a PROVIDENCE AMBULATORY SURGERY CENTER, HARRELL ROBINSON, M.D., ABASALI AMIR-JAHED, M.D., HECTOR H. ARNAZZI, M.D., STEVEN A. BURRES, M.D., CLIFFORD ERMSHAR, M.D., WILLIAM A. JORGENSEN, M.D., KONG S. KOH, M.D., LEE D. NEWMAN, M.D., TEOFILO PO, M.D., ALVIN REITER, M.D., MOHSEN TAVOUSSI, D.O., EZECKIEL ZILKA, M.D., SIM HOFFMAN, M.D., ADVANCED PROFESSIONAL IMAGING, INC., RONALD GRUSD, M.D., THE OAKS DIAGNOSTICS, INC. d/b/a ADVANCED RADIOLOGY OF BEVERLY HILLS, and DOE DEFENDANTS 1-25,

Defendants.

TO THE HONORABLE A. HOWARD MATZ, AND TO ALL PARTIES IN INTEREST:

PLEASE TAKE NOTICE that Plaintiffs Connecticut General Life Insurance Company, Equitable Life Assurance Society of the United States, Cigna Employee Benefits Services, Inc., United Healthcare Corporation, Humana Inc., Aetna Life Insurance Company and Aetna U.S. Healthcare, Inc. hereby apply for an extension of time in which to hold the Early Meeting of Counsel pursuant to Local Rules 6.1 and 7.18.

There is good cause for such extension in that economy and efficiency require an Early Meeting of Counsel and a Joint Report in which all, or substantially all, counsel can participate, and such an Early Meeting of Counsel and Joint Report will be possible only if the extension is granted.

This is a complex, multiparty RICO and insurance fraud case which was filed on August 12, 1999 against 42 defendants. At this early stage in the litigation, only 4 defendants have answered. Of the 38 defendants who have not answered, 4 have not been served and 6 that have been served have not appeared by counsel. Of the 28 served defendants who do have counsel, almost all have asked for and been granted extensions of time to respond to the Complaint. Many have indicated that their clients are seeking to substitute insurance defense counsel in the near future.

The earliest of the 4 answers was served on September 7. In the absence of the requested extension, a first Early Meeting of Counsel would be required by

October 7, and a Joint Report on October 21, followed by additional Early Meetings and Joint Reports as and when other defendants answer. Proceeding in this piecemeal fashion would be very inefficient and would result in Early Meetings and Joint Reports of marginal, if any, value. An Early Meeting of Counsel and Joint Report in which all counsel can participate is essential for the efficient case management that the Early Meeting and Joint Report are intended to promote.

For these reasons, plaintiffs request that the Court issue an order extending the time for plaintiffs to convene an Early Meeting of Counsel, and providing that plaintiffs file a status report on November 1 advising the Court as to the number of defendants who have answered and whether and when additional answers are expected, and proposing either a concrete date for the Early Meeting or a date for a further status report.

This application is based on this Notice, the accompanying Memorandum of Points and Authorities, and the Declaration of Eve Triffo with attached exhibits. All know defense counsel have been notified of this Application by a faxed letter, a copy of which is attached as Exhibit 1 to the Triffo Declaration. No defense counsel have expressed any opposition to this application, and the attorney for the earliest answering defendants supports it.

Pursuant to No. 5 of the Requirements of this Court, all interested parties are hereby notified that any opposition to this Application must be filed no later than 24 hours after the fax service of this Application.

Dated: September 29, 1999

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(212) 418-8600

- and -

KENDIG & ROSS

By: s/Eve Triffo
Eve Triffo

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Los Angeles, California 90067
(310) 556-8100

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 44-2

I, Saghi Zilka, hereby certify that pursuant to Rule 44-2, the attached petition for the rehearing of the order denying my petition for a writ of certiorari is made in good faith, without intent to delay, and relies on substantial grounds not previously presented.

Dated: October 31, 2003

Saghi Zilka